



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05795/2018

THE IMMIGRATION ACTS

**Heard at North Shields
On 14th June 2019**

**Decision & Reasons Promulgated
On 28th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**THU [N]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - BANGKOK

Respondent

Representation:

For the Appellant: Mr Vokes, Counsel instructed by Warwick Vesey Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a minor whose date of birth is recorded as 9th February 2003. On 15th September 2016 application was made on her behalf to enter the United Kingdom in order that she might join her mother and father. Although her father has no leave her mother was granted discretionary leave until 7th August 2021. The infant Appellant's application was refused on 11th January 2017 and she appealed.
2. On 7th February 2019 the appeal was heard by Judge of the First-tier Tribunal Row sitting at North Shields. It was common ground that the appeal could not succeed by reference to the Immigration Rules but was

pursued by reference to the wider application of Article 8 of the European Convention on Human Rights.

3. Evidence was led at the hearing from the Appellant's mother who was the only person to give live evidence, though there was other evidence including statements said to be from the Appellant and Mrs Le, the guardian of the Appellant. From Vietnam there was also a letter from the Appellant's head teacher and other medical evidence all set out within the Appellant's bundle. Judge Row dismissed the appeal.
4. Not content with that decision, by Notice dated 8th March 2019 the Appellant sought and obtained permission to appeal to this Tribunal. By reference to those grounds Mr Vokes invited me to find that the judge had erred in taking as a starting point the Appellant's mother's immigration history to justify his finding that the Appellant's mother was in essence an unreliable witness.
5. Further, at paragraph 25 of the Decision and Reasons, Judge Row, whilst taking account of the witness statements to which I have already referred, being those from the Appellant and Mrs Le, stated that those statements "... could have been prepared by anyone", and put little weight on them for that reason.
6. Mr Vokes submitted that the approach to such evidence by Judge Row was inconsistent given what appears at paragraph 23 of the Decision and Reasons where it appears to have been accepted that a representative of the Respondent had made contact with the Appellant's guardian with it being accepted that initially that representative had been told by the man spoken to that he was the Appellant's uncle, but in a subsequent interview had said that he, that person spoken to in Vietnam, was not related by blood. It was further part of the Sponsor's evidence laid before the Tribunal that there were some problems with money lenders which explains why at paragraph 23 reference is made to the representative of the Respondent having said that there was no mention of any issue with debt in his conversation with that guardian.
7. It was common ground that the Appellant had been diagnosed as a person suffering from bipolar affective disorder. There was psychiatric evidence which recorded the Appellant as being severely depressed, though I note also that the judge recorded the Sponsor as having said that the Appellant was at the time of the hearing receiving no treatment for any mental health problems in Vietnam. What the judge did take into account, which is material to any proportionality assessment, was that there was treatment available evidenced by the medical evidence produced at the hearing.
8. In relation to Section 117B of the 2002 Act it was submitted that the judge unreasonably held against the infant Appellant that she was neither financially independent nor spoke English.

9. I note that McCombe LJ in the case of **VW (Sri Lanka) [2013] EWCA Civ 522** said at paragraph 12:

“Regrettably, there is an increasing tendency in immigration cases when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use these as a basis for saying the judge’s decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge’s finding of fact.”

10. The issue for me ultimately is whether the findings made by this judge were ones that were open to him. Was the finding, I ask rhetorically, against the weight of the evidence? Was the decision perverse? Was the decision irrational?
11. Although the first submission was premised on the basis that the judge had erred by having regard to the immigration history of the Sponsor and taking that as a starting point, Mr McVeety pointed out that in fact that was not how the judge approached the immigration history. It was not, for example, that the Sponsor had simply overstayed, but rather that the Sponsor had misstated the facts relevant to her obtaining the eventual status which she obtained. She had at one time in her witness statement made reference to having been recognised as a refugee, though in fairness she had in a supplementary statement which appears to be wrongly dated 2018 but probably 2019 (otherwise the supplementary statement predates the original statement), said that she currently had discretionary leave putting right the fact that she could not have been recognised as a refugee, but what she had hidden from the Secretary of State, and no issue was taken on this by Mr Vokes in his submissions to me, was that she had concealed the fact that she had a husband when making her application.
12. There was clearly a proper basis open to the judge to find that the Sponsor was unreliable, and the judge was entitled, that being the only live evidence, to consider the effect of what he reasonably determined to be a misstatement of the facts on the overall assessment of the evidence. Whether that which is set out at paragraph 23 of the Decision and Reasons could properly be characterised as evidence is not a point that was taken in the grounds, nor is it suggested that any objection was taken to that “evidence” in the hearing before Judge Row, but it is open to a judge to give less weight to evidence not made available for cross-examination. It has not been tested.
13. In approaching a human rights case the starting point naturally has to be a determination of whether or not there is family life at all. Mr Vokes submitted that the judge had erred in saying that he was not satisfied on the evidence that there was family life between the Appellant and Sponsor when the relationship was one of mother and child. There would be merit in that were it not for paragraph 37 of the Decision and Reasons in which

the judge went on then to consider what the circumstances were if in fact family life did exist. Although the judge did not spell it out in terms, the judge did find his way through to the proportionality assessment. It is also the case, contrary to the submissions made to me, that the judge did have regard to the welfare of the Appellant and although he did not use the words "primary consideration", the judge did say the welfare of the Appellant is best served by remaining where she is having considered the evidence as a whole. It was open to the judge to find that her best interests were where she was given the leave which the Sponsor had was limited, that the Appellant was in school, was being treated, or at least had medical treatment available to her as the need arose, and more particularly the judge clearly in my view did not find that the Appellant had established the burden being upon her that the circumstances in Vietnam were as contended for by the Sponsor on the Appellant's behalf. The fact that the Appellant is the child of persons in the United Kingdom is not in law the end of the matter. If it were there would be statutory provision making that clear. Ultimately it is a question for the judge in assessing the evidence and assessing the proportionality, and whilst another judge may have come to a different view, that is not the test for me. The test for me is whether the decision of that judge was one that was open to him on the evidence that was led.

14. In any event had I found error I would it have found it material. It is trite law that the best interests of a child to be with both parents. However, in this case one parent has no right to be in the United Kingdom and the other only a limited right. Her status is precarious. No sufficient reason was advanced as to why the family could not enjoy family life in Vietnam. The Appellant's mother had not established that she was a refugee and the notion that there were problems with moneylenders had been rejected being a finding open to the judge.

Notice of Decision

15. In the circumstances I find that there was no material error of law and it follows from that that the appeal to the Upper Tribunal is dismissed.
16. No anonymity direction is made.

Signed

Date: 26 June 2019



Deputy Upper Tribunal Judge Zucker